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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **WESTERN DIVISION – ROYBAL FEDERAL BUILDING**  
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12 ANTHONY N. CHAI,

13 Plaintiff,

14 v.

15 NETFIRMS.COM, INC., *et al.*,

16 Defendants.  
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CASE No. CV11-06988-GHK (CWx)

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF NETFIRM.COM,  
INC.'S *EX PARTE* APPLICATION  
FOR ORDER GRANTING  
LEAVE TO FILE SUR-SUR-  
REPLY**

Date: February 6, 2012 [vacated]  
Time: 9:30 a.m.  
Judge: The Hon. George H. King  
Crtrm: 650

1 Defendant Netfirms.com, Inc. (“Netfirms”) seeks leave to file a short sur-  
 2 sur-reply addressing new arguments made by Plaintiff Anthony Chai in his sur-  
 3 reply in connection with Netfirms’ motion to dismiss Plaintiff’s First Amended  
 4 Complaint. Netfirms’ motion to dismiss was set to be heard on February 6, 2012,  
 5 but that hearing was taken off calendar *sua sponte* by the minute order entered on  
 6 February 2, 2012.

7 The Local Rules of the Central District of California provide that a party  
 8 opposing a motion may not file a reply to the moving party’s reply memorandum  
 9 absent prior written order of the court. L.R. 7-10. Plaintiff has applied for such an  
 10 order. See D.I. 23 (Plaintiff Anthony Chai’s Notice of Ex Parte Application For  
 11 Order Granting Leave to File Sur-Reply (the “Application”)). The Application is  
 12 presently pending.

13 The sur-reply that Plaintiff attached to the Application raises new  
 14 arguments—arguments that Plaintiff should have raised in his opposition to  
 15 Netfirms’ motion. Specifically, Plaintiff raises the following new arguments:

- 16 1. The federal courts have applied the “extraordinary circumstances”  
 17 doctrine in cases not involving physical violence or torture (Sur-Reply at  
 18 2-3); and
- 19 2. “At least one other state supreme court has examined the extraordinary  
 20 circumstances equitable tolling doctrine in analyzing whether state law  
 21 claims were timely filed, and relied on federal cases applying the doctrine  
 22 to circumstances that did not involve torture or physical violence.” (Sur-  
 23 Reply at 4).

24 These arguments are highly misleading. As the movant with the burden,  
 25 Netfirms should have the opportunity to address these new arguments lest the  
 26 Court rely on them unchallenged.

1 For the reasons stated herein, Netfirms respectfully requests that, should the  
2 Court grant Plaintiff's application for leave to file its sur-reply, that it also grant  
3 Netfirms' application for leave to file its sur-sur-reply.  
4

5 Respectfully Submitted,

6 Dated: February 7, 2012

TURNER BOYD LLP

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8 By: /s/ Julie S. Turner  
9 Julie S. Turner

10 *Attorneys for Defendant*  
11 *Netfirms.com, Inc.*  
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**SUR-SUR-REPLY MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
NETFIRMS.COM, INC.'S MOTION TO DISMISS  
THE FIRST AMENDED COMPLAINT FOR  
FAILURE TO STATE A CLAIM (F.R.C.P. 12(b)(6))**

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CASE No. CV11-06988-GHK (CWx)

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1 In his sur-reply, Plaintiff Anthony Chai raises a number of new arguments  
 2 that rely on omissions about the cases he cites—omissions that, when corrected,  
 3 support Defendant’s argument that this case must be dismissed under the relevant  
 4 statutes of limitations.

5 **1. *Forti v. Suarez-Mason* Supports Defendant’s Argument That Any**  
 6 **Equitable Tolling In California Must Hew Closely To A Tolling**  
 7 **Statute, And Undermines Plaintiff’s Argument.**

8 In his sur-reply, Plaintiff says that “the Northern District of California has  
 9 already recognized [that] ‘California law [already] applies equitable tolling  
 10 principles similar to’ extraordinary circumstances.” Sur-Reply at 2. Plaintiff relies  
 11 on a footnote in the case of *Forti v. Suarez-Mason* for this proposition, even  
 12 quoting that footnote in part. *Id.* Plaintiff’s assertion is bereft of any analysis of  
 13 the context for this statement in *Forti*. Context here is everything.

14 In *Forti*, the defendant—an Argentinean general accused of torture and  
 15 murder—went into hiding to avoid prosecution during the running of the statute of  
 16 limitations. 672 F. Supp. 1531, 1549-50 (N.D. Cal. 1987). The court applied  
 17 *federal* equitable tolling doctrine. *Id.* at 1549 (“because the claim itself is a federal  
 18 claim, federal equitable tolling doctrines apply”). In dicta in a footnote, the Court  
 19 said that the “pendent state law claims [are not] timebarred on the face of the  
 20 Complaint because California law applies equitable tolling principles similar to  
 21 those discussed herein. *See Stewart v. Stewart, supra.*”

22 The case of *Stewart v. Stewart* is an example of the court construing a tolling  
 23 *statute* to cover something not precisely covered. As the *Forti* court itself  
 24 described, the *Stewart* case stood for the proposition that “defendant who  
 25 clandestinely visits California after an absence, is considered absent during the  
 26 period of the visit for purposes of a state *statute* excluding the period of a  
 27 defendant’s absence from the state from the limitations period.” *Id.* at 1550, citing  
*Stewart*, 152 Cal. 162, 92 P. 87 (1907) (emphasis added).

1 Indeed, California has a *statutory* tolling provision that tolls the running of  
 2 the statute of limitations while the defendant is absent from the state. See Cal.  
 3 Code Civ. P. § 351. Thus, the “equitable” portion of the Stewart holding was  
 4 expanding ever so slightly on the statutory tolling provision to cover instances  
 5 when the defendant clandestinely visits California. This is an example of the  
 6 minor deviations around the edges of statutory tolling that exemplifies California’s  
 7 approach to equitable tolling. In no way did the *Forzi* court find, hold, or  
 8 otherwise state that California has equitable tolling principles like those found in  
 9 federal law to apply to federal claims.

10 **2. The Colorado Supreme Court, In *Dean Witter Reynolds v. Hartman***  
 11 **Cite By Plaintiff, Actually Rejected Plaintiff’s Argument.**

12 For the first time in his sur-reply, Plaintiff points to a state law case to  
 13 support his argument that the federal equitable tolling doctrine would be applied by  
 14 a state court in a case involving state law claims having nothing to do with torture  
 15 or physical violence. See Sur-Reply at 4. Plaintiff argues that “at least one other  
 16 state Supreme Court has examined the extraordinary circumstances equitable  
 17 tolling doctrine in analyzing whether state law claims were timely filed, and relied  
 18 on federal cases applying the doctrine to circumstances that did not involve torture  
 19 or physical violence.” Sur-Reply at 4 (citing *Dean Witter Reynolds, Inc. v.*  
 20 *Hartman*, 911 P.2d 1094, 1097 (1996)).

21 What Plaintiff omits is the fact that the Colorado Supreme Court, sitting *en*  
 22 *banc*, **rejected** adoption of the federal equitable tolling doctrine for those state law  
 23 claims. The court established that equitable tolling in Colorado requires some  
 24 fraudulent concealment or other wrongful conduct by the defendant (what is more  
 25 accurately an equitable estoppel). *Dean Witter Reynolds*, 911 P.2d at 1096-97.  
 26 The court then stated that “Other jurisdictions [*i.e.*, not Colorado] have applied  
 27 equitable tolling in a second category of cases where extraordinary circumstances

1 make it impossible for the plaintiff to file his or her claims within the statutory  
2 period.” *Id.* at 1097.

3 At this point, the Colorado Supreme Court rejected adoption of the federal  
4 equitable tolling doctrine. The court held:

5 We find that Hartman’s case fails to invoke equitable  
6 tolling of the statute of limitations under the test accepted in  
7 Colorado and does not present circumstances in which a new  
8 or expanded test should be adopted. Neither Dean Witter  
9 nor Norwest Bank acted in any way to impede Hartman  
10 from bringing an action against them. The facts show no  
fraudulent concealment by either institution, but instead  
show that Hartman was aware of the defendants’ [allegedly  
wrongful] actions.

11 *Id.* at 1097. Plaintiff’s sur-reply fails to mention that the only state law case he  
12 identified, in which the state court considered adopting the federal equitable tolling  
13 doctrine, in fact ended with the court refusing to do so.

14 **3. Despite Plaintiff’s Belated Argument, The Federal ATCA and TVPA**  
15 **Cases On Which It Relied All Do In Fact Involve Threats Of Physical**  
16 **Violence Or Torture.**

17 Plaintiff attacks Netfirms’ characterization of ATCA and TVPA cases on  
18 which Plaintiff relies as involving physical violence or torture. Plaintiff now  
19 claims for the first time that those cases do not involve physical violence or torture.  
20 Plaintiff characterizes them instead as involving “government witness  
21 intimidation,” “disappearances,” “threat of government reprisal,” “government  
22 repression,” “evidence suppression,” and “human rights abuses.” These labels  
23 notwithstanding, the conduct involved in each case involved torture or physical  
violence—something lacking from Plaintiff’s case.

24 The chart below succinctly shows why Plaintiff’s argument does not hold  
25 water:  
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Case	Plaintiff's Characterization	Courts' Factual Findings
<i>Arce v. Garcia</i> , 434 F.3d 1254 (11th Cir. 2006)	"government witness intimidation, evidence suppression, and human rights abuses against dissidents"	Plaintiffs were tortured Salvadoran refugees; Salvadoran military government would intimidate and "perhaps torture" witnesses who came forward; plaintiffs "legitimately feared" that their family members and friends remaining in El Salvador would be subject to "the same brutalities that the plaintiffs suffered"
<i>Forti v. Suarez-Mason</i> , 672 F. Supp. 1531 (N.D. Cal. 1987)	"disappearances," executions, and inability to obtain justice	"disappearances" and summary execution
<i>Doe v. Saravia</i> , 348 F. Supp. 2d 1112 (E.D. Cal. 2004)	"threat of government reprisal"	Death threats (§ 72, 348 F. Supp. 2d at 1126); kidnapping and disappearance of witness (§ 71, <i>id.</i> at 1125-26); assassination attempt against judge and his family (§§ 73-90, <i>id.</i> at 1126-27)
<i>Hilao v. Estate of Marcos</i> , 103 F.3d 767 (9th Cir. 1996)	"disappearance"	Action was for torture, "disappearance" and summary execution; torture victims feared reprisal in light of suspension of habeas corpus (103 F.3d at 773)
<i>Doe v. Unocal Corp.</i> , 963 F.Supp. 880 (C.D. Cal. 1997)	"threats of reprisal"	"threats of reprisal from SLORC," the ruling junta in Burma, for claims accusing SLORC of torture, enslavement, systematic rape and sexual abuse (963 F.Supp. at 885)

Here the "human rights abuse" that Plaintiff alleges was an invasion of his privacy right by a Canadian web domain host. See Sur-Reply at 3. Plaintiff never alleges that the Thai government has in any instance (much less systematically) tortured, murdered, raped or "disappeared" any witness, family member or friend of anyone accused of violating the *lèse majesté* laws. The difference between Plaintiff's situation and the cases on which he relies could not be starker.

1 For the foregoing reasons as well as those presented in Netfirms' motion,  
2 opening brief and reply brief in support of this motion, Netfirms respectfully  
3 requests that the Court grant its motion to dismiss Plaintiff's First Amended  
4 Complaint, without leave to amend.

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6 Respectfully Submitted,

7 Dated: February 7, 2012

TURNER BOYD LLP

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